SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 158.

SUSAN LOWE, PETITIONER,

vs.

ALEXANDER J. DICKSON, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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I.

Dickson's Entry of Disputed Land Not Invalid Upon Its Face, But Considered Valid by Local Land Office and so Allowed.

Respondent has repeatedly argued here, also in the lower courts, that his entry of the land in controversy, made in the year 1902, showed plainly upon its face

that he was disqualified to make a homestead entry; and this contention has apparently been accepted at its full face value by the lower courts.

The facts are far otherwise. What Dickson actually stated in his homestead affidavit (R. 10) was: "That I have not heretofore made an entry under the homestead laws, except I filed W. ½ N. W. ¼ & S. W. ¼ Sec. 15, being three miles from west and eight miles from the north line of Woodward County, *and paid out on it about three years ago*" (italics are ours). This statement carried the impression to the minds of the local officers (though whether so intended or not we cannot say) that he had commuted his homestead entry instead of making final proof upon it. The local officers thereupon verified this by examining their record of cash sales, which seemed to confirm the impression, and they hence allowed the entry, but subsequently ascertained that, while Dickson paid the legal price for the land, he had in reality submitted a five-year proof (R. 3, 4).

Acting under this misapprehension, caused by Dickson's own statement, the local officers were justified in allowing the entry, because if the previous entry had been commuted he would have been qualified to make another under and by virtue of Section 2 of the Act of June 5, 1900 (31 Stat., 267, c. 716), which reads in full as follows:

> "That any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall

> be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this Act."

It follows from this that the Dickson entry was not "invalid on its face," but was apparently legal and allowable under the said Act of 1900. Dickson's own language misled the local land officers and would be apt to mislead any administrative officer. Far from showing upon its face that he had exhausted his rights under the homestead law, it showed, or indicated, that he had secured title to his previous entry under the commutation law and was for that reason entitled to enter the land now in controversy.

This fact has not been clearly set forth heretofore in this case and we therefore emphasize it now. It shatters completely the case so skillfully built up by Dickson's counsel upon the theory that his 1902 entry was "invalid on its face" and he was hence entitled to another entry of the land in 1906, upon filing application therefor during the pendency of the Lowe contest against his entry of record.

II.

The Land Entry in Question was Not Void, But Merely Voidable, and was Validated by Legislation Passed Shortly Afterward.

Less than three months after Dickson's entry was allowed, namely, on May 22, 1902, Congress passed an

Act (32 Stat., 203, c. 821, Sec. 2) allowing second homestead entries to those who had prior to the passage of the Act of May 17, 1900 (31 Stat., 179, c. 479), paid the price provided by the law opening certain Indian lands to settlement. This Act clearly validated the entry of Dickson, because he was fully within its terms and had his entry been made on May 23d instead of March 6th, 1902, there could have been no possible question about it. Both the local and the General Land offices, as well as the Secretary of the Interior, regarded it at all times as so validated. It is true that they might have canceled the entry and compelled Dickson to file another application subsequent to the passage of the Act of May 22, 1902, but such a course of procedure would have been cumbersome and wholly contrary to the practice and custom of the Land Department, which has been in all such instances to permit an erroneously allowed entry to remain intact until legislation pending in Congress had become finally enacted, and then regard the original defect in the entry as cured by such legislation. We submit that such general practice, which was followed in this particular case, is reasonable and sensible, wherefore it should be upheld by the Court under the general doctrine that a custom of the Department followed for many years will not be set aside, unless there be some compelling reason.

Counsel for petitioner has contended that the said Act of 1902 was not curative legislation; but we submit that, as it was remedial in purpose and conferred a benefit, it was properly administered by the Depart-

ment to cover entries previously allowed erroneously; and since such practice did not curtail or affect the rights of any other individual it should be sustained. Certainly the cases cited against the retroactive operation of a statute—and which are mainly criminal or revenue cases—have no application here, where the Government was extending a benefit to one of its citizens without any adverse right whatsoever being involved.

That the Interior Department follows this practice appears from its decisions in John J. Stewart (9 L. D., 543) and George W. Blackwell (11 L. D., 384), both holding that "*The right to make a second homestead entry conferred by the Act of March 2, 1889, validates such an entry made prior thereto though not authorized by the law when made.* An additional homestead entry made prior to the passage of said Act may, under the provisions of Section 6 thereof, be permitted to stand though unauthorized by law when made." And in the later case of Smith *et al. vs.* Taylor (23 L. D., 440) the Department, while finding the entry to be irregularly allowed, held that should it be canceled it would be without prejudice to the party's right to make another entry for the same tract, wherefore "*cancellation under these conditions would be a vain act. The entry will be allowed to stand.*" (Italics ours.)

The Stewart decision was cited with approval in Talmadge *vs.* Cruikshank (15 L. D., 140) and Frank L. Morgan (37 L. D., 6). It appears to represent correctly the practice of the Department permitting to

stand intact any entry which was originally allowed without authority of law, but which has been validated by a subsequent Act of Congress.

In considering another practice by the Interior Department in relation to the allowance of land entries, this honorable Court thus ruled (McLaren *vs.* Fleischer, 256 U. S., 477, 480):

> "In the practical administration of the act the officers of the Land Department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of; and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since. Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the Act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an Act of Congress fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect, and, if acted upon for a number of years, will not be disturbed except for cogent reasons," citing Brown *vs.* United States, 113 U. S., 568, 571; Webster *vs.* Luther, 163 U. S., 331, 342; United States *vs.* Hammers, 221 U. S., 220, 228; Logan *vs.* Davis, 233 U. S., 613, 627; Le Roque *vs.* United States, 239 U. S., 62, 64.

III.

Under a Settled Practice of the Interior Department Dickson's Entry of Record Segregated Land Involved, and Prevented Acquisition of Rights Under His Later Application.

The many decisions rendered in this case by the General Land Office and the Department to the effect that Dickson's 1906 application could not be allowed, and that it conferred no right upon him, were in harmony with the general doctrine established by the Department prior to that time and followed consistently ever since.

True it is that prior to June 14, 1899, there had been some conflict of opinion in the Department on the question of filing applications for land already included in an entry of record, but on that date the Department held, in Stewart *vs.* Peterson (28 L. D., 515), that "no rights, either inchoate or otherwise, are acquired to lands involved in a pending contest, by an application to enter filed before the rights of the entryman have been finally determined," and directed the preparation of a circular letter to the various local land officers to carry this ruling into effect. Such circular was promulgated on July 14, 1899 (29 L. D., 29), and it has since been in full force and effect. This was nearly three years prior to the allowance of Dickson's entry and seven years before he presented the homestead application under which he now claims, hence the Stewart-Peterson doctrine fully covered his case and

prevented the Department from allowing his 1906 application and from recognizing the acquisition of any right thereunder.

This honorable Court had occasion to refer to and follow the doctrine of Stewart *vs.* Peterson in its decision in Holt *vs.* Murphy (207 U. S., 407, 414, 415); and, in the language of Mr. Justice Brewer in that case—

> "By this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

In passing, it should be noted that the three Interior Department decisions relied upon by Dickson and cited on pages 15 and 16 of his brief were all rendered many years prior to the establishment of the Stewart-Peterson ruling, and hence they constituted no precedent for the Department to follow in this case. Moreover, they all involved entries allowed for lands not subject thereto and are, therefore, inapplicable here, where the land was clearly subject to appropriation when the Dickson entry was made in 1902.

In petitioner's brief, heretofore filed, it has been shown that the uniform practice of the Department in the cases of entries erroneously allowed to minors, and to aliens, etc., has been to permit them to stand of rec-

ord providing the disqualification be removed before the interposition of any adverse right, and that this practice was followed or at least recognized by this Court, except in one particular instance, namely, Prosser *vs.* Finn (208 U. S., 67). We have no intention to elaborate on that portion of the argument, except to invite attention to the fact that the last-mentioned case was based upon the organic law of the Land Department enacted when the General Land Office was created in 1812, re-enacted when that office was reorganized in 1836, carried into the U. S. Revised Statutes as Section 452, and continued ever since as part of the basic law of the Interior Department in relation to the disposition of the public lands. Surely it can have no application to a case like this, where the law was changed within three months after the original entry was made, and over two years before the contestant's rights intervened, also more than four years before filing of the application upon which respondent relies. And it is significant that Prosser *vs.* Finn was decided almost contemporaneously with Holt *vs.* Murphy (*supra*), and made no reference thereto.

This whole question was ably discussed and settled by the decision of this Court in Hastings and Dakota Railroad Company *vs.* Whitney (132 U. S., 357-366). Therein Mr. Justice Lamar, who had previously been a distinguished Secretary of the Interior, thus laid down the law:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make

an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. *When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.* If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so the entry may then be canceled. *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.*" (Italics are ours.)

IV.

The Mere Tender of a Homestead Application and Appeal from Its Rejection Not Sufficient to Entitle Applicant to Bring an Action to Establish a Resulting Trust.

In our previous brief (pages 32-41, inclusive) it was argued at length that Dickson, by merely tendering his application of July 2, 1906, and appealing from its rejection, did not bring himself within the rule that one seeking to establish a resulting trust to a tract of former public land must show complete title in himself and not merely cast doubt upon the title of another. In the language of this Court (Fisher *vs.* Rule, 248 U. S., 314, 318):

> "It is a familiar rule that to succeed in such a suit the plaintiff 'must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and, being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. Sparks *v.* Pierce, 115 U. S. 408, 413; St. Louis Smelting & Ref. Co. *v.* Kemp, 104 U. S. 636, 647; Bohall *v.* Dilla, 114 U. S. 47, 50; Lee *v.* Johnson, 116 U. S. 48, 50; Duluth & I. R. R. Co. *v.* Roy, 173 U. S. 587, 590; Johnson *v.* Riddle, 240 U. S. 467, 481; Anicker *v.* Gunsburg, 246 U. S. 110, 117."

In attempting to escape from this long-settled rule of the Federal courts, respondent has cited several

decisions, but none of them is applicable here. Thus in Duluth & I. R. R. Co. *vs.* Roy, 173 U. S., 587, the patent involved was issued by inadvertence and mistake, rather than designedly and after a full consideration of all conflicting claims, as in the present case; furthermore, the case was tried by the court and full findings of facts made, including the finding that defendant made settlement in good faith, established residence, and ever since resided upon, improved, and cultivated the land. The situation here is utterly different.

Ard *vs.* Brandon (156 U. S., 537) was tried upon admissions of record that defendant had resided upon the land with his family from 1866 to 1872, and that he then applied to make final proof. Moreover, it was not a suit to establish a trust, but a mere action for the recovery of possession. In Svor *vs.* Morris (227 U. S., 524), the evidence established defendant's settlement, continuous residence, occupation, cultivation of 100 acres, and improvements exceeding $2,000 in value (page 526), and the court held "that in point of residence, improvements, and cultivation, the defendant fully complied with the homestead law, is not questioned" (page 528). And finally, Nelson *vs.* Northern Pacific Railway Co. (188 U. S., 108), was tried upon a stipulation of facts, which included the admission that Nelson had resided upon the land continuously from 1881 to the time of filing the suit.

It is clear that none of these cases is an exception to the general rule, which we have above quoted, and

accordingly none is authority for the refusal by the Supreme Court of Oklahoma to apply that rule to the facts of the present case. Here the various tribunals of the Interior Department found repeatedly that Dickson had never settled upon the land in good faith, had never resided thereon or made it his home, had never cultivated and improved it, as required by law; and, though he was allowed a new trial, the result of it was merely to make the findings against him stronger (R., 27, 29, 32).

Dickson never attempted to submit final proof on his 1906 application, nor to supply the evidence of two credible witnesses, as well as his own, nor to give notice of his intention to make such proof and enable the adverse party to cross-examine him and his witnesses. Instead, the only possible step he took was to file, in the Probate Court, an affidavit (R., 38) purporting to be a final affidavit—but which surely could not take the place of the sworn statements of himself and two credible witnesses submitted before the local land office under the forms and with the sanction required by the homestead statutes (which statutes are quoted in full on pages 37-40 of our previous brief).

It is true that in his second amended and supplemental petition, filed July 31, 1919 (R., 1), he claims that he lived upon, improved, and cultivated the land subsequent to July, 1906, but this is denied by the amended answer of Lowe (R., 34), and no proof was submitted in support of it. Even if such proof had been made, it would not take the place of the final

proof required by law to be made before the Interior Department and of the sufficiency of which the Interior Department is the sole judge.

Furthermore, that no credit can be given Dickson's uncorroborated averment in the amended petition as to his residence on the land subsequent to 1906 is demonstrated by the fact of his swearing in his affidavit of that date (R., 12, 13) "that this affiant is now and for several years last past has been living continuously upon said tract of land and has placed valuable and lasting improvements thereon"—the exact opposite of which has been found by the local land office, the General Land Office, and the Secretary of the Interior after the hearing held in May, 1905, and after the rehearing held in May and June, 1909. And, as a further indication of the credit which must be given Dickson's own affidavit, we refer to the five character witnesses introduced at the first hearing (R., 18); also to the affidavits of 75 of his neighbors as to his reputation for truth and veracity in that community, which affidavits were filed recently in this Court in response to Dickson's motion for additional security.

Even without this, however, the fact remains that no final proof was ever submitted by Dickson, nor any attempt to that end made, nor any showing as to his alleged residence, improvements, and cultivation, except his uncorroborated affidavit filed in the lower court. The Interior Department, the sole judge of the existence and sufficiency of such facts, has been required by the State Courts' decisions to accept as embodying the truth Dickson's sole affidavit, though

contrary to all the facts found by the Department, after trial and new trial, in accordance with the laws of evidence. Further comment on the effect and incorrectness of the decisions below is wholly unnecessary.

V.

Party Seeking Equitable Jurisdiction of Court is Precluded from Alleging Nullity and Invalidity of Public Land Entry Deliberately Made by Him and Under Which He Accepted Benefits for Many Years.

Within a few days after Dickson made his entry of the land in dispute, to wit, March 6, 1902, he was notified by the local land office that his entry was erroneously allowed; that the General Land Office would doubtless hold it for cancellation on that account, and that if he desired he might relinquish the entry and secure return of the fees and commissions paid thereon, *but he took no action whatever under said notice* (R., 4). The entry was regularly reported to the General Land Office, was posted there on the tract books, no action being taken against it because of its irregular allowance, but in every way (except for the notice above mentioned) it was treated as a properly allowed entry of public land, and upon passage of the Act of Congress of May 22, 1902, it so became.

For more than four years after its allowance Dickson accepted the benefits of this entry, including the sole and undisputed right to possession of the land. During this time, a first-contest affidavit was filed by

Lowe, hearing had upon it, and decision rendered in Dickson's favor, all prior to the second contest, begun January 28, 1905 (R., 16). Thereupon Lowe's second contest was begun, went to hearing, and was decided against Dickson, namely, on June 20, 1906 (R., 15).

It was not until after such hearing and such decision against him, namely, on June 27, 1906, that Dickson employed attorneys to investigate the condition of his homestead entry, as he himself alleges in his homestead affidavit of July 2, 1906 (R., 12). And while he then maintained that his entry was invalid and later took an appeal from its rejection—though it is doubtful whether this was filed within five months instead of the 30 days required by the Interior Department's rules of practice (R., 15)—he did not make this contention to the exclusion of his claims as to the sufficiency of his residence, etc., but prosecuted both phases of his case together, and on appealing to the Secretary of the Interior he made the further contention that the local office's letter of March 11, 1902, "operated as a suspension of the entry and excused him from residence on the land" (R., 22).

Upon the rejection of his 1906 application being affirmed by both the General Land Office and the Secretary, he appears to have dropped that contention and instead applied for a new trial of the facts as to his residence under the 1902 entry. This was granted him and after the second hearing he apparently made no contention as to the alleged invalidity of his 1902 entry, but instead defended that entry against the charges made by Lowe, so far as can be judged from

the decisions rendered thereon. Not until the case had been finally adjudicated against him, his entry canceled, and Dickson had made entry, do we find him bringing the contention against the Lowe entry that his own 1902 appropriation of the land was "null and void" (R., 40, 41, 42).

It follows that for more than four years after making his entry in 1902 respondent accepted all the benefits of it without any question whatsoever, and that his first claim about its "invalidity" was made so soon after the decision against him upon Lowe's contest as to lead inevitably to the belief it was the result of that decision. Then for four more years he continued to defend against the Lowe contest, claiming that he had fully complied with the law under his homestead entry, submitting testimony thereon, also securing rehearing, etc., and thus for eight years demanding and securing all the possible benefits of that entry, though during a short period of that time claiming its invalidity for the evident purpose of strengthening his case on the merits. Not until he had finally and completely lost out before the Interior Department, after repeated hearings, appeals, and motions, did he elect to relinquish all claim under his 1902 entry and maintain that that entry was "null and void from its very inception."

We earnestly submit that he is precluded from setting up this claim in a court of equity, where he is required to come "with clean hands." He should not be allowed during so many years to claim under the entry and secure all the benefits due under the homestead statutes only to disclaim it later when it suited

his purposes and urge that not only his own entry, but all proceedings against it, were invalid *ab initio*. In the language of the Secretary of the Interior in this case (R., 22), "he could not assert the entry to be valid and at the same time regard it as void. As he asserted it to be good, and the law permitted it, he was bound to comply with the law of that entry."

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its benefits and effect by taking a position inconsistent therewith. Thus it has been repeatedly held that a person by the acceptance of benefits may be stopped from questioning the existence, validity, and effect of a contract (Cyc., vol. 16, title Estoppel, pages 787 *et seq.*). That an entry of public land is a contract between the entryman and the Government is too well settled to need citation of authorities. The court below failed to apply this well-known doctrine, probably because of its mistaken assumption (R.,52) that "early in the contest proceeding, plaintiff was asserting his right under his attempted entry of July 2, 1906, and asserting that his entry of March, 1902, was void," which, as above shown, is contrary to the record facts. Had this action been brought in a court of law, Dickson would have been estopped from setting up the alleged invalidity of an entry whose benefits he had claimed for so many years, and we respectfully urge that in a court of equity and on application for an extraordinary equitable remedy, namely, the setting aside of a land patent issued by the United States

Government, the reasons against his being permitted such contention are even stronger.

Conclusion.

We maintain, with all due respect, that the opinion and judgment of the Supreme Court of Oklahoma are contrary, not only to the practice and decisions of the Interior Department rendered during a long period of years, but also to many decisions of this honorable Court. Accordingly, we pray that that judgment be reversed. All of which is

Respectfully submitted,

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